EX P PUBLIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[ORIGINATING SUMMONS NO: D5-24-316-2000]
13 FEBRUARY 2001

COMPANY LAW: *Charges - Registration - Application for extention of lodgment in respect of two charges - Delay in lodging for registration statement of prescribed particulars - Companies Act 1965, s. 108 - Whether clearly inordinate - Whether an offence under s. 109 Companies Act 1965 – - Whether just and equitable to grant relief sought - Whether affidavit had fallen short of the requirements in Re Kris Cruisers - Whether supporting affidavit failed to comply with s. 114 Companies Act 1965*

By this *ex parte* summons the applicant bank was seeking an order under s. 114 of the Companies Act 1965 ('the Act') that the lodgment with the Registrar of Companies of registration of two charges it had created in respect of two pieces of land be extended.

Held:

[1] Under s. 108 of the Act, the applicant would be required to lodge for registration with the Registrar of Companies a statement of the prescribed particulars in respect of each charge within 30 days of its creation. Both the charges were created some five years back. The delay to lodge the prescribed particulars in due compliance with s. 108 of the Act was clearly inordinate and had in fact exposed the applicant to an offence under s. 109 of the Act.

[1a] Under s. 109 of the Act, the company and any officer who is in default commits an offence if they fail to comply with the preceding s. 108 of the Act. For as long as the company remains an offender, it would be inappropriate for the court to lend its hand to grant an order of extention.

[2] It was clear that the supporting affidavit had fallen short of the requirement envisaged by Vaisey, J in *Re Kris Cruisers*. The poverty of its content was glaring. All that was disclosed by the deponent was that the omission to register was due to inadvertence without so much as to state how it was brought about and by whom. Nothing was said as to why the omission was left to linger for over five years. Neither did the deponent commit himself to say whether the making of the order applied for would prejudice any creditor or member of the company, an important factor which the court was bound to consider before making the order, more so in this case where the delay was considerable.

[3] In the interest of expediency however, provided the applicant is prepared to own up to the offence, an order for extention may be granted on the condition precedent that the applicant pays the penalty the Registrar of Companies may impose. In the event, it would be necessary for the applicant to state in the supporting affidavit whether it would be prepared to admit the offence and to pay the penalty. In the instant application, the supporting affidavit failed to satisfy the requirement of s. 114 of the Act.

[Application not allowed; applicant at liberty to make a fresh application.]

Case(s) referred to:
Re Kris Cruisers, Ltd [1948] All ER 1105
United Overseas Bank v. Forward Overseas Credit [1988] 1 MLJ 496

Legislation referred to:
Companies Act 1965, ss. 108(1), 109, 114

Companies Act 1948 [UK], s. 101

For the applicant - Koh Meng Hui; M/s Iza Ng Yeoh & Kit

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

By this *ex parte* summons the application bank seeks an order under s. 114 of the Companies Act 1965 that the lodgment with the Registrar of Companies of registration of two charges it had created in respect of two pieces of land be extended.

The grounds supporting this application were set out in the affidavit of Lim Chee Keong, a person who appeared to have no specific function but who nevertheless had been authorised by the applicant to affirm the affidavit, an issue which I shall revert to shortly.

The relevant paragraphs of his affidavit read as follows:

1. Saya adalah pegawai Pemohon yang mengendalikan perkara ini dan saya telah diberi kuasa yang sempurnanya untuk membuat afidavit ini untuk dan bagi pihak pemohon yang dinamakan di atas.

2. Segala fakta-fakta yang dinyatakan di sini adalah dari pengetahuan saya sendiri dan/atau dari rekod di mana saya mempunyai akses yang penuh kecuali di mana dinyatakan sebaliknya.

3. Pihak Pemohon telah meluluskan pinjaman berjumlah RM1,320,000.00 ("Pinjaman Pertama") kepada Soon Ee Sing Hardware Sdn Bhd (No Syarikat 117342-W) ("Pinjaman Tersebut") melalui sepucuk surat bertarikh 24 haribulan Oktober 1994 ("Surat Pertama) dijamin oleh suatu gadaian atas ke semua harta yang dipegang di bawah H.S.(D) 85297 P.T. No. 24132, Pekan Serendah, Daerah Petaling, Negeri Selangor ("Hakmilik Pertama").

4. Peminjam Tersebut telah melalui suatu Gadaian bertarikh 13 haribulan Januari 1996 ("Gadaian Pertama") dan Perserahan No. 295/96 Jilid 1 Folio 183 menggadaikan Hakmilik Pertama kepada Pemohon untuk menjamin Pinjaman Pertama serta faedah.

5. Sesalinan Surat Pertama dan Gadaian Pertama dilampirkan di sini dan ditanda secara kumpulan sebagai ekshibit "A".

6. Pihak Pemohon juga telah meluluskan pinjaman berjumlah RM418,000.00 ("Pinjaman Kedua") kepada Peminjam Tersebut melalui sepucuk surat bertarikh 5 haribulan Mac 1996 ("Surat Kedua") dijamin oleh suatu gadaian atas ke semua harta yang dipegang di bawah H.S.(D) 2151 P.T. No 1355, mukim Serendah, Daerah Ulu Selangor, Negeri Selangor ("Hakmilik Kedua")

7. Peminjam Tersebut telah melalui suatu Gadaian bertarikh 28 haribulan Mac 1996 ("Gadaian Kedua") dan Perserahan No. 41205/96 Jilid 98 Folio 55 menggadaikan Hakmilik Kedua kepada Pemohon untuk menjamin Pinjaman Kedua serta faedah.

8. Sesalinan Surat Kedua dan Gadaian Kedua dilampirkan di sini dan ditanda secara kumpulan sebagai ekshibit "B".

9. Saya telah dinasihati dan sesungguhnya percaya bahawa Borang 34 hendaklah difailkan dalam jangkamasa tiga puluh (30) hari selepas wujudan Gadaian Pertama dan Gadaian Kedua menurut Seksyen 108, Akta Syarikat, 1965.

10. Pada 14 haribulan Mac 2000 saya telah menyemak dokumentasi-dokumentasi mengenai pinjaman-pinjaman kepada Peminjam Tersebut dan didapati bahawa Borang 34 mengenai Gadaian Pertama dan Gadaian Kedua belum difailkan oleh Peminjam Tersebut.

11. Oleh yang demikian saya dengan rendah hati memohon kepada Mahkamah yang Mulia ini untuk suatu perintah seperti yang dipohon dalam Saman dalam Kamar yang difailkan di sini.

Before considering the substance of this application, it is necessary that I allude first to the capacity of Lim Chee Keong to speak for the application in making this application. He did not disclose precisely what position of authority he

holds in the applicant bank apart from saying he was an officer who was authorised to make the affidavit, that he had access to the records of the bank, and that what he deposed to in his affidavit was from his own knowledge.

The affidavit, it must be appreciated, commits the bank to assume the responsibility for any consequence that may arise therefrom. In addition the affidavit carries with it the integrity of the bank for all that have to be said therein which the court have to rely upon and accept. It would therefore be necessary for the bank to ensure that only persons holding a position of responsibility good enough to carry its implied authority should depose the affidavit – usually the bank manager, or where the establishment is large, at least the relevant sectional head. It would be unacceptable for a mere official without any specific portfolio who happens to be acquainted with the matter to depose an affidavit.

Now, to return to the substance of the application.

Section 114 of the Companies Act 1965 reads as follows:

> 114 Extension of time and rectification of register of charges:
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> The Court, on being satisfied that the omission to register a charge (whether under this or any corresponding previous written law) within the time required or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders or that on other grounds it is just and equitable to grant relief, may on the application of the company or any person interested and on such terms and conditions as seem to the court just and expedient (including a term or condition that the extension or rectification is to be without prejudice to any liability already incurred by the company or any of its officers in respect of the default) order that the time for registration be extended or that the omission or mis-statement be rectified.

The first charge was on land held under H.S. (D) 85297 P.T. No. 24132, Pekan Serdang, Daerah Petaling and was created on 13 January 1996 *vide* Presentation No. 295/96 Jilid 1 Folio 183.

The second was on land held under H.S. (D) 2151 P.T. No. 1355, Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor and was created on 28 March 1996 *vide* Presentation No. 41205/96 Jilid 98 Folio 55.

Under s. 108 of the Companies Act 1965, the applicant would be required to lodge for registration with the Registrar of Companies a statement of the prescribed particulars in respect of each charge within 30 days of its creation.

Both the charges were created some 5 years back. The delay to lodge the prescribed particulars in due compliance with s. 108 was clearly inordinate and had in fact exposed the applicant to an offence under s. 109 of the Act which read as follows:

> 109 Duty to register charges
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> (1) Documents and particulars required to be lodged for registration in accordance with section 108 may be lodged for registration by the company concerned or by any person interested in the documents, but if default is made in complying with that section the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit. Default penalty.

Under s. 108(1) a failure to register a charge on a land within 30 days of its creation under s. 108 of the Act will render it void against the liquidator or creditor of the company with the dire consequence that the chargee would be relegated to the position of an unsecured creditor if the company goes into liquidation. An order granting the extension of time for the registration of a charge would under the circumstances, provide the saving grace for the chargee – for it has the effect of making the charge valid *ab initio*, although its priority if called into question, would still have to be decided by the normal rules pertaining to its creation. (*United Overseas Bank v. Forward Overseas Credit* [1988] 1 MLJ 496 per Grimberg JC of the Singapore High Court).

A court deciding whether to grant an extension has to enquire as a matter of priority whether the order would not prejudice the position of creditors or members of the company. It would for instance, have to enquire whether for the duration that the charge remained unregistered, any person had been induced to give the company any credit on the footing that the assets of the company were not subject to any charge. In short it has to satisfy itself that there is no sinister reason why the charge was not registered within the period required.

A court exercising its power to grant an order of extension under s. 114 is in fact dispensing equity to moderate the strict requirement of statute. It follows that where it could be ascertained with certainty that the failure to register was only due to the accidental act or inadvertence of any party and that the interest of others would not be affected by the extension, the application should as a matter of conscience be allowed. Delay or procrastination in making the application, being merely a secondary factor should not under the circumstances be an impediment to the making of the order.

In order to assist the court to arrive at an appropriate order, it would therefore be necessary for the applicant to state clearly in his affidavit whether he is making the application on this ground alone. He would have to declare in such a case that the making of the order would not prejudice the position of any creditors or members of the company.

On the other hand where it is clear that the granting of the order would prejudice the position of any creditors or members of the company, it would be incumbent on him to set out in his application the circumstances as to how they would be so affected so as to enable the court to assess the application by the last criteria prescribed in s. 114 – whether it is just and equitable to grant the relief sought. To ensure that an order is not obtained behind their backs it would be necessary to make them a party to the application.

The approach that I have set forth, stems at least in part from the observation of Vaisey, J of the Chancery Division in *Re Kris Cruisers, Ltd* [1948] All ER 1105, which I consider sound and of contextual relevance.

In that case, a company (which was insolvent at the time the application was made) had failed to register two instruments of charge within the time prescribed under an identical provision of s. 101 of the English Companies Act 1948. The omission was due to the fact that the secretary of the company had thought that the chargees had registered them while the chargees had thought the secretary had done so. The affidavit evidence supporting the application was sparse and meagre but nevertheless in the circumstances of that case was held to be sufficient, the insolvency notwithstanding. Vaisey, J in granting an order in terms said at the opening paragraph of his judgment:

> This is an application, under the Companies Act, 1948, s. 101, asking the court to extend the time for delivering to the Registrar of Companies, for registration, two instruments of charge, dated Mar. 7, 1947. In this case, as in others which have come before me, I desire to call attention to the meagre character of the evidence filed in support, which, however, in this case seems to me to be just, though only just, sufficient to satisfy the provisions of the section. I think it is most important that the court should be fully informed of the circumstances which have given rise to the omission to register within the proper time and that the evidence should not, as is so often the case, merely state that the matter was accidental and due to inadvertence without particularising the reasons for the breach of the statutory requirements and the surrounding circumstances. People seem to be under the impression that, on their merely saying that the omission was "due to inadvertence," the court is practically obliged to exercise the power, which I hold to be a discretionary power, under the Companies Act, 1948, s. 101. This section replaced the Companies Act, 1929, s. 85, which itself was taken from s. 96 of the Act of 1908, and that, in turn, reproduced s. 15 of the Act of 1900.

Further down in the fourth paragraph he said:

> There is a statutory right in the mortgagee or chargee to come to the court to be relieved of the consequences of his own negligence and lack of caution, provided that the court is satisfied that the omission to register was not with any fraudulent intention, but was, in the words of the Companies Act, 1948, s. 101, "due to inadvertence or to some other sufficient cause." Pausing there, I think that the words, "some other sufficient cause," would be satisfied if it were proved that the secretary of a company had been wrongly advised by his solicitor or counsel that registration need not be sought. There are other possible circumstances to which those additional words following the word "inadvertence" might apply. In the present case the inadvertence was due to an obvious mistake. The solicitors of the chargees thought that the secretary of the company had registered the charges, as he ought to have done, and the secretary of the company thought that the chargees had registered the charges, as they might have done, and between the two of them, each supposing the other had carried out the requirements of the section, they overlooked the fact that neither of them had done so. That seems to me to be inadvertence, intention, carelessness, but very far removed from the kind of case in which this relief should be refused – a typical case of which would be one in which there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public, to whom its registration would have given the appropriate notice.

In the instant application, it is clear the supporting affidavit has fallen short of the requirement envisaged by Vaisey, J in *Re Kris Cruisers (supra)*. The poverty of its content is glaring. All that was disclosed by the deponent is that the omission to register was due to inadvertence without so much as to state how it was brought about and by whom. Nothing was said as to why the omission was left to linger for over five years. Neither did the deponent commit himself to say whether the making of the order applied for would prejudice any creditor or member of the company, an important factor which the court is bound to consider before making the order – more so in this case where the delay was considerable.

Quite apart from the question of inadequacy of the supporting affidavit, there is another aspect of the application that must be addressed. Under s. 109 of the Act *(supra)*, the company and any officer who is in default commits an offence if they fail to comply with the preceding s. 108 to lodge the charge for registration within 30 days of its creation. For as long as the company remains an offender, it would be inappropriate for the court to lend its hand to grant an order of extension.

In the interest of expediency however, provided the applicant is prepared to own up to the offence, an order for extension may be granted on the condition precedent that the applicant pays the penalty the Registrar of Companies may

impose. In the event, it would be necessary for the applicant to state in the supporting affidavit whether it would be prepared to admit the offence and to pay the penalty.

In the instant application the supporting affidavit fails to satisfy the requirement of s. 114 of the Companies Act 1965. The application is disallowed. The applicant is however at liberty to make a fresh application with all the requisite materials.